Supreme Court, U.S.
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No. 02-1171

IN THE

Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

TELECOR COMMUNICATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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INTRODUCTION

In its Reply to the Brief in Opposition to Petition for a Writ of Certiorari, Petitioner Southwestern Bell Telephone Company (SWBT) requests leave to amend its Petition to raise a *new* question presented, and seeks *new* relief in the form of a summary order of remand to the Tenth Circuit for further consideration. *Reply*, 4-6, 10. Pursuant to Sup. Ct. R. 15(8), Respondents Telecor Communications, Inc., *et al.*, submit this supplemental brief to address these new matters.

I. There Is No Justification For The Proposed Amendment To The Question Presented

SWBT seeks to amend its Petition to revise its legal defenses in light of the Oklahoma Supreme Court's decision in *Fine Airport Parking, Inc. v. City of Tulsa*, 2003 OK 27, __ P.3d __ (Okla. 2003) by adding a new question presented: "Whether the court of appeals erred in predicating its analysis of SWBT's immunity defense on federal law rather than on Oklahoma law." *Reply*, 5.[1] To support the addition of a new question presented, SWBT invokes Robert L. Stern, *et al.*, Supreme Court Practice § 6.27 (8th ed. 2002). But as that authority makes clear, adding a question presented under these circumstances is both suspect and unwarranted. In particular, the proposed amendment comes after the 90-day jurisdictional period for filing certiorari petitions, which raises a serious question as to whether this Court even has jurisdiction to permit such an amendment. *Id.* at § 6.27, p. 427. Fortunately, this Court need not consider that issue, as any amendment of the questions presented is allowed only for "the most compelling of reasons," *id.*, and no compelling reasons exist here.

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1. This proposed new question makes no sense given that the District Court's rejection of SWBT's immunity defense, affirmed by the Tenth Circuit, *was* based on Oklahoma law. App. 82a.

As SWBT acknowledges, *Fine* affirmed the District Court and Tenth Circuit's rejection of its sole ground for immunity — the federal state action doctrine. Indeed, the District Court used the same rationale as *Fine*, concluding that the federalism principles underlying the doctrine were inapplicable under Oklahoma law. App. 82a; Resp. App. 9a. Having lost on that issue below, SWBT now argues that *Fine* warrants a remand of the case to the Tenth Circuit under the guise that *Fine* changed Oklahoma law and created a broader immunity. But *Fine* neither changed or reversed existing Oklahoma law, nor created a new immunity defense.

As the District Court noted below before *Fine* was decided, "no Oklahoma case recogniz[ed] application of the state action doctrine." App. 82a. In *Fine*, the Oklahoma Supreme Court made clear that the state action immunity doctrine does not apply under Oklahoma law, but found immunity under a well-established exemption analysis. Applying decades-old principles of statutory reconciliation, *Fine* held that the *specific* statutory authority to set parking rates for the public good[2] exempted the municipality from liability under the *general* antitrust statutes (which otherwise would have prohibited the conduct). *See Gardner v. School Dist. No. 87, Kay Co.*, 126 P. 1018 (Okla. 1912) (where *specific* statute permits a particular thing which would otherwise be prohibited under *general* statute, specific statute "is to be construed in the nature of an exception" to prohibition under general statute). Thus, having opted not to advance the exemption defense below,[3] SWBT should not

2. In *Fine*, plaintiff alleged that the municipality set parking rates at predatorily low levels. The *Fine* court found that the defendant municipality, acting as an arm of the state and for the public good, was expressly authorized by statute to set parking rates, the very conduct challenged as anticompetitive. *Fine*, Resp. App. 2a, 13a.

3. SWBT's contention that it raised "more general immunity principles, not state action" before the District Court (*Reply*, 4 n.3) (Cont'd)

be afforded an opportunity to do so now, particularly since, under the facts in this case, it would not change the outcome. *See* Part II, *infra*.

II. There Is No Justification For Summary Remand To The Tenth Circuit

In addition to seeking leave to present a new question, SWBT's Reply also makes a new request for a summary order granting certiorari, vacating the judgment below, and remanding the case for the Tenth Circuit to reconsider all issues raised in the Petition. A "GVR" is "potentially appropriate" only where "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation . . . ." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (*per curiam*). A GVR is not appropriate here because there is no intervening development that calls into question the Tenth Circuit's holdings in this case.

Not only does *Fine* not change Oklahoma law, but it also does not remotely suggest that the Tenth Circuit's decision was in error. In the decision below, the Tenth Circuit found nothing in Oklahoma law that "expressly permitted" SWBT's private anticompetitive conduct, and concluded that SWBT's private anticompetitive conduct was neither "regulated," "mandated," "authorized," "endors[ed]," "reviewed," nor even "known" by the Oklahoma Corporation Commission. *Telecor*, App. 25a n.7, 26a. Indeed, the Tenth Circuit

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(Cont'd)

is false. The "state action doctrine" is the only immunity defense SWBT listed in the Pretrial Order. SWBT-App 2168-70. SWBT disclaimed the exemption analysis before the Tenth Circuit. *See Respondents' Brief In Opposition*, at 11 n.4.

concluded that SWBT's conduct was designed "to stymie . . . competition" in order to monopolize the payphone market for its own private benefit and not because the regulatory program called for or anticipated any such result. *Id.* at 3a, 25a.

The Tenth Circuit's findings contrast sharply with the holding in *Fine* that the Municipal Airports Act expressly permitted the municipality's challenged anticompetitive conduct — the fixing of airport parking rates — as part of its "public and governmental functions" necessary in order "to meet a public need and not solely for its own benefit." *Fine*, Resp. App. 17a. In the instant case, SWBT took discretionary actions that were not called for by the regulatory program and were for its own benefit. Consequently, sending this case back to the Tenth Circuit would serve no purpose because the factual findings of the Tenth Circuit (which SWBT does not challenge) preclude *any* immunity.

SWBT's new request for a remand to the Tenth Circuit of the damage and market definition issues is also unsupported since SWBT fails to point to any "intervening development." On the damage issue, SWBT claims the Tenth Circuit failed "to consider" two Oklahoma Supreme Court decisions, both of which were decided over fifty (50) years ago and one of which was actually cited to and considered by the Tenth Circuit.[4] Because SWBT's requested GVR on damages is based on alleged failure to consider Oklahoma law, it also lies outside the scope of its question presented (which asserts the existence of a federal circuit conflict, *Pet.*, i). SWBT's only support for remand on the market definition issue is that the Tenth Circuit should be directed to reconsider two United States Supreme Court cases, both of which were

4. SWBT seeks reconsideration of the damage issue based on *Comar Oil Co. v. Hackney*, 250 P. 93, 99 (Okla. 1926), previously briefed by SWBT to the Tenth Circuit (*See SWBT's Pet. for Reh'g*, 13), and *Fleming v. Perkins*, 212 P.2d 122, 129 (Okla. 1949).

also cited to and considered by the Tenth Circuit.[5] Since these cases were cited to the Tenth Circuit, there is no reason to believe that reconsidering the same authorities would cause that court to change its opinion.

CONCLUSION

SWBT's request for leave to amend its question presented, and request for a GVR, are specious and should be denied.

Respectfully submitted,

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5. SWBT seeks reconsideration of the market definition issue based on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) and *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992), both of which were briefed by SWBT to the Tenth Circuit. (*See Brief of SWBT*, 27; *SWBT Pet. for Reh'g*, 2).